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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL, INC.), ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION; THE ALLIED EDUCATIONAL FOUNDATION; U.S. REPRESENTATIVES MICHAEL G. OXLEY, JOE BARTON, TOM DeLAY, BILL GOODLING, AND BOB BARR IN SUPPORT OF CORPORATE RESPONDENTS

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BRIEF OF AMICI CURIAE
THE WASHINGTON LEGAL FOUNDATION;
THE ALLIED EDUCATIONAL FOUNDATION;
U.S. REPRESENTATIVES MICHAEL G. OXLEY
JOE BARTON, TOM DeLAY,
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IN SUPPORT OF CORPORATE RESPONDENTS

INTEREST OF AMICI CURIAE[1/]

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide, including many who are subject to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, *et seq*. WLF also has a substantial interest in the development and application of appropriate principles to limit the extent to which federal regulatory statutes displace state law in areas traditionally regulated by the States. The Allied Educational Foundation (AEF) is a non-profit public policy organization that shares many of WLF's interests. WLF appeared as amicus curiae in this case when it was before the U.S. Court of Appeals for the Sixth Circuit, and both WLF and AEF appeared together in other relevant cases before this Court. *See, e.g.*, *Atherton v. FDIC*, 117 S.Ct. 666 (1997).

Congressional amici U.S. Representatives Michael G. Oxley, Joe Barton, Tom DeLay, Bill Goodling, and Bob Barr also have a strong interest in this case as Members of

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[1/] Pursuant to Supreme Court Rule 37.6, no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than amicus Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief. This brief is being filed with the written consent of the parties.

Congress and congressional leaders.[2/] As legislators, they have a particular interest in the proper interpretation of CERCLA, and object to a broader reading of CERCLA than what Congress originally intended. They have also appeared as co-amici with WLF and other Members of Congress in another CERCLA case opposing the retroactive application of CERLCA as being contrary to the intent of Congress and constitutionally suspect. *See Olin v. United States*, 107 F.3d 1502 (11th Cir. 1996).

Indeed, amici are concerned with the practice of the courts to "legislate" in CERCLA cases involving liability issues which the Congress either avoided or failed to clearly address. Thus, we have the spectacle of federal courts propounding federal rules of decision to deduce the liability of corporate officers, *Bowen Engineering v. Estate of Reeve*, 799 F. Supp 467, 474, *aff'd without op.*, 993 F.2d 223 (3d Cir. 1993), and successors, *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992). Very recently, this Court has been asked to create a federal common law standard to adjudge the liability of individual corporate shareholders. *Donahey v. Livingstone, petition for cert. filed*, 66 U.S.L.W. 3475 (U.S. Jan. 9, 1998).

Accordingly, amici can bring a broader perspective to this case than the parties, and believe that this case provides

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[2/] Mr. Oxley is Chairman of the Subcommittee of Finance and Hazardous Materials of the House Commerce Committee; Mr. Barton is Chairman of the Subcommittee of Oversight and Investigations of the Commerce Committee; Mr. DeLay is House Majority Whip and member of the Appropriations Committee; Mr. Goodling is Chairman of the Committee on Education and the Workforce; and Mr. Barr is a member of the Judiciary, Government Reform and Oversight, and Banking and Financial Services Committees.

an opportunity for the Court to impose the proper discipline on these related CERCLA issues, and to provide needed direction in an area that swirls with controversy. Alternatively, the Court can send Congress a strong message that CERCLA is badly in need of repair.

SUMMARY OF ARGUMENT

The Court has established a clear discipline for determining whether to create federal common law standards, and application of that discipline counsels against adopting a federal common law standard in this case. Because no significant conflict exists between any federal policy or interest that proponents of a federal common law standard might advance and the use of state common law, there is no justification for creating a federal rule of decision to construe the term "operated." None of the purported federal interests advanced by proponents of a federal rule of decision--uniformity, imposition of liability on responsible parties, or the statute's remedial purpose — raise a significant conflict with the use of state common law.

The Court should not be deceived by notions of statutory interpretation into abandoning the governing discipline for determining whether to adopt a federal common law standard. Proponents of a federal common law standard are unconvincing when they argue that the word "operated"--no more and no less--expresses clear congressional intent to displace a well-established body of state common law. Moreover, certain statutory interpretation notions advanced by proponents of a federal common law standard simply do not support the contention that the statutory term "operated" allows imposition of so-called "direct" liability on corporate parents. In sum, proponents of a federal rule of decision have failed to meet the heavy burden of justifying creation of such a rule.

ARGUMENT

I. CREATING A FEDERAL RULE OF DECISION TO CONSTRUE THE TERM "OPERATED" IS UNJUSTIFIED, BECAUSE NO SIGNIFICANT CONFLICT EXISTS BETWEEN A FEDERAL POLICY OR INTEREST AND THE USE OF STATE COMMON LAW

The case before the Court does not present one of the "few and restricted" instances in which creation of a special federal rule of decision is warranted to avoid a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (citations omitted). Proponents of a federal rule of decision would have the Court create federal common law to determine a parent corporation's liability under CERCLA section 107(a)(2).[3/] Because the use of state common law does not create a "significant conflict" with any of the purported federal interests--uniformity, imposition of liability on responsible parties, or CERCLA's remedial purpose--the adoption of a federal rule to construe the term "operated" is not justified.

A. As a Precondition to Establishing a Federal Rule of Decision, Petitioner Must Demonstrate that the Use of State Common Law Would Result in a "Significant Conflict" with a Federal Interest

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[3/]Section 107(a)(2) of CERCLA imposes liability for cleanup costs on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2) (1997).

A "significant conflict between some policy or interest and the use of state law" is a "precondition for recognition of a federal rule of decision" for judging a parent corporation's operator liability under CERCLA. *O'Melveny*, 512 U.S. at 87. Congress did not define the meaning of the term "operated" as used in CERCLA section 107(a)(2). Construing the term "operated" to create "direct" CERCLA liability for parent corporations would constitute the creation of a federal rule of decision. The displacement of state law in the case at bar cannot be justified under *O'Melveny*. Absent any significant conflict between a federal policy or interest and use of state law, matters left unaddressed in comprehensive and detailed federal statutory schemes are left subject to disposition provided by state law. *O'Melveny*, 512 U.S. at 85-89.

The presumption that state law should govern is "particularly strong" in the "corporate law" arena, "in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen v. Kemper Financial Services*, 500 U.S. 90, 98 (1991) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 739 (1979)). Indeed, this case concerns the limited liability of corporations, recognized as "one of the first principles of American law," and which may be the single most fundamental principle in American corporate law. Stephen Presser, *Piercing the Corporate Veil*, § 1.01 at 1-4 (1997) (hereinafter "Presser, *Piercing*"); Maurice Wormser, *Disregard of the Corporate Fiction and Allied Corporate Problems*, at 14 (1927). Petitioner has not overcome the presumption that state common law provides the appropriate standard of liability, as it has not demonstrated under the governing discipline that the case at bar is one of those "extraordinary cases in which the judicial creation of a

federal rule of decision is warranted." *O'Melveny*, 512 U.S. at 89.

The creation of a federal rule of decision to determine the CERCLA liability of parent corporations in the case at bar would also violate the Rule of Decisions Act. 28 U.S.C. § 1652 (1997). The Act provides that:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652. The Act creates a presumption that state common law--not federal common law--applies in all civil litigation (not just in diversity cases) except to the extent that a federal statute, treaty or Constitutional provision authorizes or requires a different rule of decision.

In the case at bar, CERCLA does not require the application of a federal rule of decision to determine a parent corporation's liability under Section 107(a)(2). CERCLA does not expressly contain language compelling such a result, and proponents of a federal rule of decision have failed to establish that the application of state common law would create a "significant conflict" with a federal policy or interest. As a result, the presumption of the Rules of Decision Act applies, and state common law provides the governing rule of decision.

B. No "Significant Conflict" Exists Between Purported Federal Interests and the Use of State Common Law to Determine Parent Corporation Liability

Proponents of a federal rule of decision have alluded to certain federal policies or interests that they hope the Court would characterize as conflicting with the use of state law, thereby establishing the basis for a federal rule of decision. For reasons set forth below, none of these policies or interests provides a sufficient basis for displacing state common law.

1. *The Alleged Quest for National Uniformity Is Not a Sufficient Basis for Displacing State Common Law*

The Court should not recognize a federal rule of decision where an alleged need for uniformity belies a desire to alter governing legal principles. The alleged need for a nationally uniform standard for parent corporation liability under CERCLA does not constitute a sufficient federal interest upon which to found federal common law. Moreover, proponents of a federal rule of decision are not truly seeking a uniform standard, but rather seek to alter the state common law principles that govern determinations of corporate parent liability, a result the Court will not countenance.

The stated need for uniformity does not provide a sufficient federal interest upon which to found federal common law. As the Court recently stated, "[t]o invoke the concept of 'uniformity' ... is not to prove its need." *Atherton v. FDIC*, 117 S.Ct. 666, 671 (1997); *see also O'Melveny*, 512 U.S. at 88 (rejecting the notion that facilitating FDIC's nationwide litigation of similar suits qualified as an identifiable federal interest). The Ninth Circuit Court of Appeals concluded that the *O'Melveny* Court placed a "heavy burden" on a party intending to prove "the need for uniformity." *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295, 1299

(9th Cir. 1997). In the case at bar, proponents of a federal rule of decision have not carried this heavy burden.

Neither the circuit court decisions on which proponents of a federal common law standard rely, nor their own attempts at cohesion, demonstrate the uniformity they seek. The decisions of the circuit courts that have embraced a federal common law standard demonstrate the elusiveness of uniformity. A close reading of the passages from the Petitioner's summary of these decisions reveals this. U.S. Br. at 29-30 citing *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), *cert. denied*, 490 U.S. 1084 (1991) ("pervasive involvement in the subsidiary's operations") and 27 ("a parent corporation that participates in the operation of a subsidiary's facility"); *Schiavone v. Pearce*, 79 F.3d 248, 254 (2nd Cir. 1996) ("based on 'the independent actions of the parent corporation, evidenced through its control over the polluting site'"); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) ("there is evidence of substantial control exercised by one corporation over the activities of the other"); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993) ("when that person actually supervises the activities of the facility. That is, the person must play an active role in the actual management of the enterprise."). Proponents of a federal rule of decision find it impossible themselves to state the standard in a uniform fashion. Petitioner states the standard in numerous different ways. In order to discern the lack of uniformity, the Court need only examine the words that follow the phrase "actively participates in, and exercises control over" in what Petitioner claims is the appropriate distillation of the standard.[4/]

[4/] U.S. Br. at (I) ("the operations of a subsidiary"); (III) ("the operation of a subsidiary's facility"); 8 ("[the subsidiary's] business, including environmental matters, through the direct involvement of [parent] officers in [the subsidiary's] policy decisions and day-to-day operations"); 16 ("operation of a facility"); 17 ("the running of the facility," "the operations of a subsidiary's facility"); 18 ("the operations of the subsidiary's facility"); 21 ("running of the facility"); 23 ("the management of a facility"); 24 ("managerial or decision-making control over a facility's operations"); 25 ("managerial or decision-making control over the operations of a facility"); 32 ("the operation of a facility," "the operation of the facility"); 34 ("the operation of a subsidiary's facility"); 35 ("the facility in question"); 41 ("the day-to-day operation of a subsidiary and its facility," "the operation of the facility"); 42 ("the operations of the subsidiary in a manner that constitutes operation of the facility"); and 44 ("the operations and management of the subsidiary's activities in a way that establishes that [the parent's] officers actually participated in the operation of the subsidiary's facility").

While not necessarily uniform, state common law standards share strong similarities.[5/] The veil-piercing test employed by states to judge parent corporation liability generally have two dominant requirements: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer

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[5/] The similarity alone might provide the Court with a basis for forebearing from creating a federal rule of decision. As the Ninth Circuit has stated:

> [T]here has been no real explanation of the need for uniformity in the particular area of successor liability -- especially since state law will in many other instances determine whom the EPA may or may not look to for compensation. If state law varied widely on the issue of successor liability, perhaps the need for a uniform federal rule would be more apparent.

Atchison, 132 F.3d at 1300.

exist, and (2) the circumstances must indicate that adherence to the fiction of a separate corporate existence would sanction a fraud or promote injustice. 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 41.30 (1990); *see also* Presser, *Piercing*, ch. 2, at 1-540 (analyzing veil-piercing tests of the fifty states, of which approximately forty states require the showing of both requirements to pierce the corporate veil).

Moreover, proponents of a federal rule of decision do not truly seek uniformity, but rather hope to have the Court substantially alter the otherwise governing state common law. It is the second dominant requirement of the states' common law standards--adherence to the fiction of a separate corporate existence would sanction a fraud or promote injustice--that proponents of a federal rule of decision seek to eliminate. Michigan law allows the corporate veil to be pierced only upon a finding of fraudulent purpose, injustice, or circumvention of public policy, and the Sixth Circuit determined that the facts presented were not sufficient to make such a finding. *CPC International Inc. v. Aerojet General Corp.*, 777 F. Supp. 549, 574, 578-79 (W.D. Mich. 1991). Petitioner enumerates detailed factual findings regarding CPC's activities that relate to the first dominant requirement under state common law that the separate personalities of the parent and subsidiary no longer exist. U.S. Br. at 12. It becomes apparent, then, that Petitioner advocates a federal rule of decision to *alter* the governing law to eliminate the second dominant requirement under the governing state common law.[9]

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[9] The Fifth Circuit concurs with the Sixth Circuit that elimination of this second dominant requirement is not warranted, and the Court should not be deceived by suggestions to the contrary. The distinction that Amici States draw between the Fifth Circuit's decision in *Joslyn Manufacturing Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991), and the case before the Court presently, Amici States Br. at 17, does not undermine the Fifth Circuit's fundamental agreement with the Sixth Circuit that a federal common law standard is unwarranted. Amici States appear to want to diminish the significance of Fifth Circuit's concurrence with the Sixth Circuit by noting that, in *Joslyn*, the Fifth Circuit did not have facts before it to suggest that the "parent corporation had actually participated by its own acts in managing the operations of the subsidiary." *Id.* That the *Joslyn* court ruled on distinguishable facts does not diminish the significance of its holding that it would not impose "operator" liability on a parent corporation unless the corporate veil could be pierced under state common law principles. 893 F.2d at 82-83.

The Court should not countenance such an alteration under the guise of attempting to achieve uniformity. To do otherwise would, as the Court has declared, "create additional 'federal common law' exceptions" that would "not . . . 'supplement' this scheme but . . . alter it." *O'Melveny*, 512 U.S. at 87. The Ninth Circuit recently rejected a similar plea for purported uniformity as relates to corporate successor liability with reasoning equally applicable to the issue of parent corporation liability.

> The argued "need" for uniformity thus stems not from discrepancy among the various states, but from the alleged need for a more expansive view of successor liability than state law currently provides -- in other words, the notion that state law on this issue is inadequate for CERCLA's purposes.

Atchison, 132 F.3d at 1300. *See also Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996) (rejecting need for uniform federal rule to determine successor liability of corporations under CERCLA).

Because the desire for federal uniformity in this case is not in itself a sufficient interest to warrant a federal common law standard, and because the true aim of federal common law proponents is to supplant--not supplement--the statute, the Court can again conclude: "There is not . . . at stake that most generic . . . of alleged federal interests, the interest in uniformity." *O'Melveny*, 512 U.S. at 88.

2. *Using State Common Law To Determine Corporate Parent Liability Does Not Create a Significant Conflict With CERCLA's Imposition of Cleanup Costs on "Responsible Parties"*

Determining a parent corporation's liability under a state common law standard does not create a significant conflict with CERCLA's imposition of cleanup costs on responsible parties. A state common law veil-piercing standard effects the proper balance between the protection afforded by the corporate form and CERCLA's imposition of cleanup costs on responsible parties. Recent decisions of the Ninth and Eleventh Circuit Courts of Appeal support the use of a state common law standard to balance CERCLA's purposes with corporate law principles. Furthermore, the admitted infrequency with which Petitioner seeks to hold a parent corporation liable on the basis that it "operated" its subsidiary or its subsidiary's facility shows that a conflict, if any, between a federal interest and use of a state common law standard cannot be "significant."

Proponents of the development of a federal common law standard contend that the Court will somehow subvert the statute's goal of imposing costs on "responsible parties" if it fails to impute "direct" liability to corporate parents. U.S. Br. at 4-5 (citations to legislative history regarding those "responsible" for any damage); 7 (citations to

legislative history regarding those who "cause such damage" to "benefit with impunity"); and 41 (goal of imposing the costs of cleanup on those who are responsible for creating hazardous conditions). It is uncontested that CERCLA attempts to impose cleanup costs on "responsible parties." Proponents of a federal rule of decision have not demonstrated, however, that there is a federal interest in capturing parent corporations as "responsible parties" in instances in which state common law would not.

State common law effects the appropriate balance between the protection afforded by the corporate form and competing public policy objectives, such as CERCLA's imposition of liability on "responsible parties." The effect of the corporate form, and the circumstances under which that form may be disregarded are traditionally matters of state, not federal, law. "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based on a federal statute." *Burks v. Lasker*, 441 U.S. 471, 478 (1978). That a parent corporation might "elude" CERCLA liability by virtue of its maintaining the integrity of the corporate form and not utilizing the corporate form to perpetrate a fraud--so as to prevent the corporate veil from being pierced--is entirely consistent with the tenet that "[a] surrender of the principle of limited liability can only be made 'when the sacrifice is essential to the end that some accepted public policy may be defended or upheld.'" *Anderson v. Abbott*, 321 U.S. at 362 (quoting Chief Judge Cardozo's opinion in *Berkey v. Third Ave. Ry. Co*, 244 N.Y. 84, 95 (1926)). It merely recognizes that Congress has not, in this instance, abrogated the limited liability afforded through the corporate form.[7/]

[7/] Petitioner's contention to the contrary is based upon a troubling circularity. Petitioner contends that the courts must

Both the Ninth and Eleventh Circuit Courts of Appeals have recently recognized that state common law effects the appropriate balance between corporate limited liability and CERCLA's imposition of cleanup costs on responsible parties. *Atchison*, 132 F.3d at 1299-1301 (holding that the successor liability of a corporation should be judged under state law); and *Redwing Carriers*, 94 F.3d at 1489 (applying state common law to determine CERCLA liability of limited partners for violations committed by partnership). In *Atchison*, the Ninth Circuit found no evidence that the application of state corporate law would frustrate CERCLA's objective of imposing the costs of cleanup on those responsible for the contamination. The court stated, "[n]o state provides a haven for liable companies. Nor is there reason to think that states will alter their existing successor liability rules in a 'race to the bottom' to attract corporate business." 132 F.3d at 1301 (quoting in part *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J. concurring). The court recognized that "successor liability rules were, after all, developed to address much more than environmental liability." *Id.* at 1301.

In *Redwing Carriers*, the Eleventh Circuit decided that state common law, not a federal rule of decision, governed the question of whether a limited partner could be held

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adopt a federal common law standard to impose Superfund liability on corporate parents without reference to state common law veil-piercing. U.S. Br. at 41 ("CERCLA *dictates* that the corporation should be responsible") (emphasis added). But Petitioner's reasoning begs the question it intends to answer. It demands the Court find that corporate parents are "responsible parties" without analyzing how--whether by the use of state or federal common law--one determines who Congress intended to include as "responsible."

accountable for the CERCLA liability of the partnership. As in *Atchison*, the court rejected the argument that applying a state common law standard would defeat CERCLA's goal of having "responsible parties" pay. *Redwing Carriers*, 94 F.3d at 1502. The *Redwing Carriers* court found that state rules permit plaintiffs to hold limited partners accountable for a partnership's CERCLA liability under certain circumstances, and that it did "not foresee states enacting more protective statutes in an effort to defeat CERCLA's goal of having the polluter pay." *Id.* The *Atchison* and *Redwing Carriers* reasoning holds true in the context of parent corporation liability as well. Because states have a substantial interest in protecting their citizens and natural resources, they also have an interest in ensuring that parent corporations do not unjustly avoid liability--environmental or otherwise.

Even if there were a federal interest in imposing Superfund liability on corporate parents where state common law would not, it would still fail to provide a sound basis for displacing state common law, because--under the governing legal discipline--the interest would not be in "significant conflict" with the use of state common law. Petitioner appears to acknowledge that use of state common law does not create a "significant" conflict with Petitioner's purported federal interest. In its petition for certiorari, the government conceded the infrequency with which it seeks to hold a parent corporation liable on the basis that it "operated" its subsidiary's facility. U.S. Pet. at 26-27 (stating that the government "does not routinely" seek to hold parent corporations liable for conditions at a subsidiary's facility). If that is the case, then it is difficult to imagine how curtailing the capture of parent corporations in CERCLA's liability net in these limited instances could create a "significant" conflict. *Cf. Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) ("To the point that courts could achieve 'more' of the

legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits.").

As a result, the Court should reject the contention that failure to impute a federal rule of decision will "disserve the federal program" just as it has previously rejected attempts to "presume to judge what constitutes malpractice" on the basis of similar claims. *O'Melveny*, 512 U.S. at 89. The underlying concern with the "runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy," *id.*, remains the same whether the Court is asked to second guess what constitutes malpractice, as in was in *O'Melveny*, or, as it is in the instant case, the circumstances in which parent corporations should be held liable.

3. *Abiding by State Common Law Does Not Frustrate CERCLA's Remedial Purpose*

Applying a state common law standard to determine parent corporation liability will not frustrate CERCLA's remedial purpose. Petitioner and Respondent Michigan DEQ ("MDEQ") accurately observe that advancement of the statute's remedial purpose constitutes a federal interest. U.S. Br. at 40, MDEQ Br. at 17. Federal common law proponents have not been able to demonstrate, however, that in instances in which the corporate veil cannot be pierced under state common law, the statute's remedial purpose will in fact be frustrated.

CERCLA cleanups will *not* come to a halt if parent corporations are adjudged according to state common law veil-piercing standards. The Superfund trust fund exists to finance removal and response actions, so that money will be available for cleanups even if--as in the instant case--certain

parent corporations are adjudged not to be liable under a state common law veil-piercing standard. The trust fund, funded primarily by taxes on the oil and gas industry and a broad-based corporate environmental income tax, exists as a source of government monies to carry out cleanup actions authorized by the statute. 42 U.S.C. § 9611; *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986). While the statute confers upon the government the right to recoup amounts expended from the trust fund, the statute does not require that every dollar expended from the fund is to be recovered.[8/] 42 U.S.C. § 9611. The Environmental Protection Agency's own policies contemplate use of trust fund monies without reimbursement. For example, EPA uses the fund without reimbursement in instances in which liable responsible parties are insolvent, and hence who will not contribute toward cleanup costs. EPA policy adopts an approach of "mixed funding" (combining money from responsible parties and the trust fund) "to promote settlement and hazardous site cleanup" at those sites at which PRPs are financially unable to fund the entire cleanup. U.S. Environmental Protection Agency, Evaluating Mixed Funding Settlements Under CERCLA, at 2 (Oct. 20, 1987). Thus, the trust fund's very existence; the fact that "there is no federal policy that the fund should always win" *O'Melveny*, 512 U.S. at 88; and because the Court has "previously rejected 'more money' arguments remarkably similar to the one made here," *id.* at

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[8/] Of course, the statute's joint-and-several liability regime eases replenishment of the fund by allowing the government to sue one responsible party for the entire costs of the cleanup, regardless of whether other parties were responsible for the release of hazardous substances at the site. *See, e.g., United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 267-71 (2d Cir. 1992).

88 (citations omitted),[2/] all weigh against finding that the statute's remedial purpose constitutes a federal interest that will be sacrificed through use of state common law.

[2/] While not advancing a "federal interest or policy" for purposes of the *O'Melveny* analysis, Amici States contend that failing to displace state common law will "shift cleanup costs and responsibilities from responsible persons to states and their taxpayers." Amici States Br. at 4, 5. Even had Amici States adequately explained how this result would be brought about, it is not a federal interest that could provide a foundation for creation of a federal rule of decision. Moreover, Amici States could address the perceived problem directly by amending their "Little Superfund" statutes to make it easier to pierce the corporate veil to impose cleanup liability on parent corporations. *See* Robert B. McKinstry, Jr., *The Role of State "Little Superfunds" in Allocation and Indemnity Actions Under the Comprehensive Environmental Response Compensation and Liability Act*, 5 Vill. Envtl. L.J. 83 (1994) (for a general discussion of state Superfund laws). Certainly, state legislatures are not unaware of the second dominant requirement in veil-piercing tests and their ability to alter it. *Cf.* La. Rev. Stat. Ann, tit. 12, § 93 (1997) (adopting veil-piercing standard that does not require a showing of fraud or injustice, albeit outside the CERCLA context). Nor are states unaware of their ability to alter the Superfund liability regime. *See Schiavone*, 79 F.3d at 255-56 (discussing Connecticut little-Superfund statute requiring showing of culpability). It follows then, that states could seek relief legislatively rather than appealing for a federal rule of decision.

II. NEITHER THE "ORDINARY AND NATURAL" MEANING OF THE TERM "OPERATED" NOR THEORIES OF STATUTORY INTERPRETATION ADVANCED BY PROPONENTS OF THE DISPLACEMENT OF STATE COMMON LAW PROVIDE A BASIS FOR VITIATING THE CORPORATE FORM

The Court could only adopt a federal rule of decision in this case by doing substantial violence to fundamental principles of corporate law. Neither the "ordinary and natural" meaning of the term "operated" advanced by proponents of a federal rule of decision nor other notions of statutory interpretation establish a sound basis for taking such action.

A. The "Ordinary and Natural" Meaning of the Term "Operated" Does Not Evince A Congressional Intent To Impose "Direct" Liability on Corporate Parents

Proponents of a federal rule of decision urge an "ordinary and natural" meaning for the term "operated" that a careful reading of the statute and permissible inferences do not support. In the enactment of statutes, the legislature is presumed to have considered the state of the common law. *United States v. Texas*, 507 U.S. 529, 534 (1993); *Thompson v. Thompson*, 218 U.S. 611, 612 (1910). It is a longstanding principle that a statute "is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Pennsylvania R. Co.*, 101 U.S. 557, 565 (1879); 3 *Sutherland Statutory Construction*, § 61.01 (1992). To alter the common law, "the language of the statute must be clear and explicit." *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983). Contrary to the interpretations urged by

proponents of a federal rule of decision, the "ordinary and natural" meaning of the term "operated" can be given effect without "making any innovation upon the common law" not intended by Congress. The Court should also not be swayed by inferences drawn from the statutory definitions of the terms "owner" and "person" or from the use of the disjunctive to support the notion of "direct" liability advanced by federal common law proponents.

1. *Dictionary Definitions Do Not Provide Persuasive Authority for "Direct" Liability*

Dictionary definitions aside, Congress did not use the word "operated" to pronounce a new standard of liability for corporate parents. Certainly, in including "operated" with "owned" in CERCLA section 107(a)(2), Congress intended to include more than simply site owners within this category of liable parties. The use of the word "operated," however, would not only be a strange and obtuse way to supersede the traditional protection of the corporate form, but would be contrary to the Court's teaching that Congress must speak clearly and explicitly to abrogate established principles of state common law. *Norfolk Redevelopment & Housing. Auth.*, 464 U.S. at 35-36.

The fact of the matter is that the "ordinary and natural" meaning of the term has nothing to do with imposition of liability without regard to corporate form. The natural meaning of the phrase "any person who owned or operated" a facility-- including all the dictionary definitions offered by Petitioner (U.S. Br. at 20-21)--simply extends liability to both the owner and operator when a site is owned by one person and operated by another. In other words, the term "operated" imposes liability on tenants, lessees, and contract operators who do not own the facility but "manage" or "direct the working of" the facility's operations. U.S. Br.

at 20 (quoting *The Oxford English Dictionary* (2d ed. 1989)). To go beyond that to suggest that in using this term Congress intended to impose liability without regard to corporate form is unwarranted. The fiction of "direct" liability that Petitioner posits begs the question that can only be answered in accordance with the rules that govern creation of federal common law. It is far too facile to reckon that CERCLA liability attaches directly to the parent not because of the acts of its subsidiary but because of its "own acts." U.S. Br. at 33 (arguing that direct liability arises, because, under principles of corporate law, a corporation is not insulated from liability for its own acts). Whether liability attaches to the parent is at the crux of the current controversy, and must be determined in accordance with the rules established for the creation of federal common law.

In fact, there is simply no support in the language of the statute that Congress intended courts to determine liability of parent corporations through the use of any standard than other than the state common law test of piercing the corporate veil. *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991); *cf. United States v. USX Corp.*, 68 F.3d 811, 824 (3d Cir. 1995) (discussing lack of Congressional intent to obviate corporate form in context of parent corporation's "transporter" liability); and *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1091-92 (8th Cir. 1995) (rejecting a "control" test for determination of parent corporation's "arranger" liability). In *Joslyn*, the Fifth Circuit panel examined CERCLA's language, noting that Congress specifically created "owner or operator" liability based upon "control" of a facility, but that it limited the application of the "control" standard to certain circumstances. *Id.* at 83. "The term 'owner or operator' is defined for facilities conveyed to state or local governments by bankruptcy, tax delinquency or abandonment, as 'any

person who owned, operated, *or otherwise controlled* activities at such facility immediately' before conveyance." *Id.* (quoting in part 42 U.S.C. § 9601(A)(iii)) (emphasis added by the court). The *Joslyn* court concluded that, by its expressed use of a "control" standard in limited situations, Congress manifested its intention not to displace the rule of traditional limited liability absent a piercing of the corporate veil in other situations concerning parent corporations. *Id.; see also* Dent, *Limited Liability in Environmental Law*, 26 Wake Forest L. Rev. 151, 156 (1991) (concluding that the failure to apply "control" standard of liability in previous subsection of CERCLA does not appear to be a mere oversight).

2. *Statutory Definitions of "Person" and "Owner" Do Not Support the Concept of "Direct" Liability*

The statutory definition of the term "person" to include "corporations" provides no basis for concluding that Congress intended to impose "direct" liability on parent corporations. In fact, quite the opposite is a more logical conclusion. The inclusion of the term "corporation," as well as "association" and "partnership" (none of which are expressly defined in the statute), must mean that Congress was embracing the meanings of those terms as they existed at law. *Nationwide Insurance Co. v. Darden*, 503 U.S. 318, 322 (1992); *Shaw*, 101 U.S. at 565. Petitioner and MDEQ ignore the fact that inclusion of the term "corporation" within the statutory definition of the term "person" must borrow the body of law that governs these creations of state charter.

By including the undefined term "corporation" in the statutory definition of "person," Congress must be presumed to have intended to have federal courts rely on state corporate law principles. *See Darden*, 503 U.S. at 322;

Kamen, 500 U.S. at 98-99; and *Burks*, 441 U.S. at 478. Certainly, Congress intended for the term "corporation" in CERCLA to mean the limited liability entities created by state charter. The "particularly strong" presumption that arises, then, in this "corporate law" arena, is that Congress embraced the state law that governs the "rights and obligations" of those entities. *Kamen*, 500 U.S. at 98. At least one court has applied a similar reasoning to limited partnerships. *Redwing*, 94 F.3d at 1506 (question of whether a limited partner will lose the protection generally afforded limited partners by virtue of his or her more active role in the partnership will be governed by the applicable state law that governs limited partnerships).

Nor does the statutory definition of the term "owner" provide a reasoned basis for concluding that Congress intended the term "operated" to impose direct responsibility on parent corporations. Respondent MDEQ encourages the Court to accept as a negative inference from the statutory definition of the term "owner," that Congress intended that one who participates in the management of a facility (regardless of corporate form) be liable. MDEQ Br. at 7. The statutory definition of "owner" explicitly excludes a person that is "merely that of a stockholder who does not participate in the management of a facility." *Id.*, citing 42 U.S.C. 9601(20)(A)(ii). From that exclusion, MDEQ encourages the Court to make the leap to the notion that Congress intended "operated" to include all those who do participate in the facility's management. It is not permissible to infer (or, as is the case here, to take as the negative implication) a meaning for one term on the basis of Congress's explicit directions with respect to another term. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (rejecting request to read meaning into absence of statutory language in one section as opposed to another).

3. *Recognition of Congress's Use of the Disjunctive Does Not Require Abrogation of the Corporate Form*

Proponents of a federal common law standard suggest that in order to honor Congress's use of the disjunctive "owned *or* operated," the Court must adopt a theory of "direct" liability. *See, e.g.*, U.S. Br. at 21-22. The Court can, however, recognize the significance of the use of the disjunctive--providing each of the terms with separate and distinct meanings--without abandonment of its own rules for creating federal common law.

The use of the disjunctive "owned *or* operated" indicates Congress's recognition that lessees, tenants, and contract operators may manage a facility's operations and, therefore, should be included among the classes of liable parties. Eschewing a federal rule of decision does no violence to the disjunctive "owned *or* operated." "Owner liability and operator liability [will continue] to denote two separate and distinct concepts," MDEQ's Br. at 16, if state common law is used. First, persons that hold title to a facility (including *corporate* title holders) will remain liable. Second, tenants, lessees, and contractors that do not hold title to a facility but nonetheless "manage" or "direct the work" of the facilities will also remain liable. As the two terms retain distinct meanings without imputing a federal common law meaning to the latter term, it is unnecessary to embrace the notion of "direct" liability (thereby violating rules for creation of federal common law standards) in order to honor the disjunctive nature of the two terms.[10/]

[10/] The statutory disjunctive also does not compel, as has been suggested, that there must be different standards for parent corporation liability under the terms "owned" and "operated." MDEQ's Br. at 15 ("the standard for determining whether a parent corporation is liable as either an owner or operator would be the same"). That the standard for corporate parent liability will be the same in either case is as it should be, as it adheres to state common law. What will remain distinct, however, are which parent corporations could be liable. In the first instance, parents of title holders could be liable, and, in the second, parents of (for example) lessees, tenants, and contract operators.

B. The Notion of "Direct" Liability Otherwise Relies on Incorrectly Applied Theories of Statutory Interpretation

None of the other proffered notions of statutory interpretation support the contention that Congress intended the term "operated" to create "direct" liability for parent corporations. To begin with, any effort to apply canons of statutory interpretation to CERCLA must be done cautiously. As the Third Circuit Court of Appeals has noted, because of the "inartful crafting of CERCLA," a "reliance upon general canons of statutory construction must be more tempered than usual." *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 94 (3d Cir. 1994). Viewed in this context, contentions based upon (1) the secured creditor exemption, (2) other "key terms," and (3) the remedial nature of the statute, are equally unavailing.

1. *Statutory Exceptions to the Secured Creditor Exemption Do Not Imbue the Term "Operated" With Special Meaning*

That Congress articulated a specific test for exceptions to the statutory "secured creditor exemption" is neither controlling--nor even persuasive--authority for the proposition that the term "operated" connotes "direct" corporate parent liability. Petitioner argues that the exceptions that Congress carved from the secured creditor

exemption in the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104, Tit, II, § 2502(b), 110 Stat. 3009-464 (to be codified at 42 U.S.C. § 9601(20)(E)-(F)), reveal Congress's intent with regard to the liability of parent corporations.[11/] U.S. Br. at 22-23. Petitioner would like the Court to believe that by virtue of this amendment, Congress spoke to parent corporation liability, namely that "Congress intended to impose liability on any entity that actually participated in, and exercised managerial or decision making control over, a facility's operations." *Id.* at 24.

If anything, the specificity Congress provided with respect to secured creditors weighs against Petitioner's contention. Congress did not apply the secured creditor exemption concepts to the term "operated"--something which Congress was free to do, but did not, when it amended the statute in 1996. Indeed, the facts the Petitioner presents lead to a conclusion just the opposite of the one the Petitioner advances. Congress's application of these specific concepts in connection with the secured creditor exemption--and forbearance from their application to the concept of "operated"--suggests a deliberate choice not to create a governing federal rule for determining the extent of liability for having "operated" a facility. This conclusion is more consistent with the body of the Court's teaching that, where

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11/ As Amici States explain, those "amendments . . . describe several levels of activity that will be considered participation in management by a lender," Amici States Br. at 10, thereby vitiating the secured creditor's exemption from liability. "A lender will lose its liability exclusion and become liable as an 'owner or operator' if its actions are like those of an operations manager or chief executive officer of the debtor, even if those actions do not include management of environmental compliance or practices. Id. at 11.

a legislature has acted to amend a statute to address an issue in one context, it is assumed that it did not intend to alter other aspects of the statute. *Key Tronic Corp. v. United States*, 511 U.S. 809, 818-19 (1994) (failure of SARA to provide for recovery of attorneys fees under sections 107 and 113 of CERCLA, as compared to SARA's creation of same remedy under sections 106 and 159, "strongly suggest a deliberate decision not to authorize such awards."); *Rosencrans v. United States*, 165 U.S. 257, 262 (1897).

2. *Suggested Inferences Regarding the Meaning of the Term "Operated" Drawn From the Statutory Context Are Unjustified*

That the statute supplies broad definitions to other "key terms in the broadly defined CERCLA statutory liability system," Amici States Br. at 8, is not a principled basis for construing the term "operated" to impose "direct" liability on corporate parents. Amici States contend that construing the term "operated" to impose "direct" liability is "consistent with the text and structure of CERCLA." *Id.* at 7. The "consistency" by which the Amici States hope the Court will be persuaded is allegedly found in the broad statutory definitions of several "key terms" in the statute's liability regime. *Id.* at 7-8. Specifically, Amici States cite the broad statutory definitions of the terms "release," "hazardous substance," and "facility" (as well as the "wide range of persons who are liable for cleanup costs") as support for the notion that the term "operator" must be construed similarly broadly. *Id.* at 8. Petitioner makes a similar appeal to "statutory context," though its contextual argument focuses more on the use of the disjunctive and circular reasoning about who is a responsible party. U.S. Br. at 21-22.

Appeals to the statutory context are neither controlling, nor persuasive. *See FTC v. Sun Oil Co.*, 371

U.S. 505, 515 (1963) (rejecting argument that Congress intended to invoke by omission in one section the same broad meaning explicitly provided in another section). The Court can dispense with the contention that the statute creates "direct" parent corporation liability in much the same way it rejected, in *O'Melveny*, the federal regulator's argument that its statutory grant of authority should be read as a nonexclusive grant of rights "which can be supplemented or modified by federal common law." *O'Melveny*, 512 U.S. at 86. In the *O'Melveny* case, the Court concluded that the federal regulator's argument was "demolished" by statutory provisions "which specifically create special federal rules of decision regarding claims by, and defenses against" the regulator. *Id.* The specific statutory provisions the *O'Melveny* Court identified included: (1) the extension of the statute of limitations beyond the period state laws might impose, (2) precluding state law claims against the regulator under certain contracts, and (3) permitting claims against directors and officers for gross negligence regardless of whether state law would require greater culpability. *Id.*

Similar statutory provisions likewise "demolish" the notion of "direct" parent corporation liability under CERCLA. CERCLA contains comparable statutory provisions that: (1) establish causes of action for equitable contribution and establish a statute of limitations for such actions without regard to state law, 42 U.S.C. §§ 9613, 9622; (2) limit defenses that might otherwise exist under state law, 42 U.S.C. § 9607(b); and (3) abrogate certain indemnity agreements, 42 U.S.C. § 9607(e). As a result of these similarities, the Court will just as quickly demolish the notion of "direct" parent corporation liability under CERCLA as it demolished the contention that it needed to adopt a new malpractice standard in *O'Melveny*. The statutory context in this case, with several specific "special federal rules of decision regarding claims by, and defenses against" the

regulator, suggests just the opposite of the contentions of the proponents of a federal rule of decision.

3. *Reliance on the Statute's Remedial Purpose To Construe the Term "Operated" To Impose "Direct" Liability Constitutes an Impermissible Circumvention of the Governing Analytical Framework*

The Court should not be tricked, through the guise of applying the "ordinary and natural" meaning of the term "operated," into abandoning its discipline for determining whether federal common law standards should be created. Proponents of a federal common law standard contend that the statute's broad remedial purpose requires that the Court liberally construe the term "operated" to impose "direct" liability on corporate parents. Specifically, they urge the Court to be swayed by the "remedial nature of CERCLA in support of [a federal common law-engendering] construction of the statute."[12/]

The Court should not accede to proponents' desire to cast aside the *O'Melveny* analysis in favor of a canon of statutory construction. The canon of interpretation affording a remedial statute's broad construction does not surmount the judicial doctrine limiting the development of federal rules of decision to certain situations. *Cf. United States v. An Article*

[12/] U.S. Br. at 26 (citation omitted) (arguing that by "look[ing] to the provisions of the whole law, and to its object and policy," the Court can deduce the meaning of the term "operated"); *see also* Amici States Br. at 15 (citing circuit court decisions that identify statute's remedial nature as a basis for construing the term "operated" to impose direct liability); and MDEQ Br. at 17-18 (citing *Dennis v. Higgins*, 498 U.S. 439 (1991), and circuit courts that have embraced this approach).

of Drug, Etc., 394 U.S. 784, 800 (1969) (courts must strike a balance between extending scope of remedial statute beyond the point where the legislature intended and narrowing its coverage short of what was intended); Antonin Scalia, *Assorted Canards of Contemporary Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1989) (the effort, with respect to any statute, should be neither liberally to expand nor strictly to construe its meaning, but rather to get the meaning precisely right"). Abandoning the principled analysis put forth in *O'Melveny* would be particularly unwise in the CERCLA context, mindful of the caution articulated by the Third Circuit in *Tippins* concerning "reliance upon general canons of statutory construction" to interpret the provisions of Superfund. *Tippins*, 37 F.3d at 94. Furthermore, proponents of a federal rule of decision would conveniently ignore principles articulated by the Court in interpreting statutes that are claimed to alter established common law. *Kamen*, 500 U.S. at 98; *Norfolk Redevelopment and Hous. Auth.*, 464 U.S. at 35-36; and *Shaw*, 101 U.S. at 565.

The Court has clearly described its analytical framework for determining whether to adopt a federal common law standard. The analysis requires identification of a federal interest or policy in significant conflict with use of state common law. Proponents of a federal common law standard rely to their detriment on canons of statutory construction while failing to address the governing analytical framework.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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